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Nos. 06-340, 06-549 (35) (32)

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DEFENDERS OF WILDLIFE, *ET AL.* IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Environmental Protection Agency ("EPA") raise in this Court a rationale for avoiding compliance with Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), that EPA not only failed to rely on during the administrative proceedings and before the Ninth Circuit issued its ruling, but which the agency expressly disavowed in the administrative proceedings and advised the court of appeals panel it was not arguing?

2. Assuming that the Court considers the merits of EPA's *post hoc* rationalization, whether EPA must comply with Section 7(a)(2) of the ESA in taking final action on Arizona's application for Clean Water Act permitting authority, where Section 7(a)(2)'s consultation and "no jeopardy" requirements apply to "any action" by a federal agency, 16 U.S.C. § 1536(a)(2), and this Court has already construed this language as "admit[ting] of no exception," *TVA v. Hill*, 437 U.S. 153, 173 (1978)?

CORPORATE DISCLOSURE STATEMENT

Respondents Defenders of Wildlife and Center for Biological Diversity are non-profit corporations. They have no parent corporations and there is no publicly held company that owns any stock in either organization.

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COUNTERSTATEMENT

This case concerns the United States Environmental Protection Agency's ("EPA's") "final action authorizing Arizona to implement the NPDES [National Pollutant Discharge Elimination System] program. . . . " 67 Fed. Reg. 79,629, 79,631 (2002), and whether, in taking that action, EPA complied with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). Section 7(a)(2) of the ESA provides that "[e]ach federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior], *insure that any action authorized*, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . . " 16 U.S.C. § 1536(a)(2) (emphasis added).

Although the plain terms of Section 7(a)(2) apply to the agency action at issue, and despite the fact that this Court has held that the "language [of Section 7] admits of no exception," *TVA v. Hill*, 437 U.S. 153, 173 (1978), EPA and the National Association of Home Builders ("NAHB") seek review of the ruling below on the grounds that "Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements do not apply" to EPA's decision authorizing Arizona to implement the NPDES program. EPA Pet. at 13. Petitioners take this position even though biologists with the Fish and Wildlife Service ("FWS" or "Service") – the federal agency with primary responsibility for implementing the ESA – predicted that the transfer could lead to the extinction of one or more species, and even though EPA itself determined that it was required to comply with Section 7(a)(2) before transferring NPDES authority. *See* EPA Pet. at 23.

Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller ("Defenders") will first describe the legal and factual context, and then explain why the petitions should be denied.

A. Section 7(a)(2) Of The ESA

When Congress enacted the ESA in 1973, its "plain intent ... was to halt and reverse the trend towards species extinction, whatever the cost." *Hill*, 437 U.S. at 184. This intent "is reflected not only in the stated policies of the Act, but in literally every section of the statute," *id.*, including Section 7, which "provides a particularly good gauge of congressional intent." *Id.* at 181.

The ESA's predecessor statute "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only '*insofar as is practicable and consistent with the[ir] primary purposes....*'" *Hill*, 437 U.S. at 181 (emphasis in original). "Likewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes," *id.*, namely, that other agency mandates "would always prevail [over endangered species concerns] if conflict were to occur." *Id.* at 182 (internal citation omitted). However, the "final version" of the ESA "carefully omitted all of the[se] reservations," and deleted "all phrases which might have qualified an agency's responsibilities" to avoid species extinction. *Id.* This decision to adopt "stringent, mandatory" language, *id.* at 183, reflected

> *an explicit congressional design to require agencies to afford first priority to the declared national policy of saving endangered species.* The pointed omission of the type of qualifying

> language previously included in endangered species legislation reveals a conscious decision by Congress to give *endangered species priority over the 'primary missions' of federal agencies.*

Id. at 185 (emphasis added).

As a consequence, this Court has observed, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those" in Section 7(a)(2) since the provision's

> very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . . ' This language admits of no exception.

437 U.S. at 173 (emphasis in original; internal citation omitted). In short, the statutory language was "designed . . . [to] *prohibit* [a] federal agency from taking action which does jeopardize the status of endangered species." *Id.* at 179 (emphasis in original; internal citation omitted).[1]

In *Hill*, therefore, the Court ruled that Section 7 "require[d] the permanent halting of a virtually completed dam for which Congress has expended more than $ 100 million." 437 U.S. at 172. The Court so held although

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[1] In 1978, this language was amended to provide that agencies' obligation is to "insure" that their actions are "not likely to jeopardize" the continued existence of species or result in the destruction of critical habitat, 16 U.S.C. § 1536(a)(2), but Congress did not restrict the scope of "actions" to which the provision applies.

"Congress continued to appropriate large sums of public money for the project," even after being apprised of the project's conflict with the survival of an endangered fish species. *Id.*

In response to *Hill*, Congress did not narrow the universe of federal "actions" to which Section 7's "no jeopardy" prohibition applies but, rather, created a process for resolving otherwise intractable conflicts between that prohibition and the "primary missions" of federal agencies. *Hill*, 437 U.S. at 185. Thus, the 1978 amendments "created a process by which actions authorized, funded, or carried out by Federal agencies *could be exempted* from the provisions of the Act." S. Rep. No. 97-418 (1982) ("1982 Senate Report"), *reprinted in* NAHB Appendix ("NAHB App.") at 531 (emphasis added).

In particular, the amendments allowed any agency or affected private party to "apply . . . for an exemption" if the FWS has determined that the "agency action would violate" Section 7(a)(2), but the Service and agency are unable to agree on a "reasonable and prudent alternative" that could be carried out by the agency. 16 U.S.C. § 1536(g)(1), (3). Congress created a detailed process for the assessment of such applications – including consideration by an "Endangered Species Committee" composed of high-ranking federal officials, including the Administrator of EPA, *id.* § 1536(e)(1), (3) – and also spelled out criteria for evaluating exemption requests. *Id.* § 1536(h)(1). Hence, the "basic premise" of Congress's response to *TVA v. Hill* was that "the integrity of the interagency consultation process designated under section 7 of the Act be preserved," and that "[o]nly in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee

consider granting an exemption for a Federal action." 1982 Senate Report, NAHB App. 532.

In its present form, Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance" of the FWS – which consults on behalf of the Interior Department – "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of a species' "critical" habitat. 16 U.S.C. § 1536(a)(2). Under FWS regulations, each "action agency" must first determine if a proposed action "may affect" a listed species or critical habitat; if so, the agency must request "formal consultation" with the Service, unless the Service concurs that the project is unlikely to "adversely affect" the species. 50 C.F.R. § 402.14(a), (b).

The formal consultation process culminates in a "Biological Opinion" ("BiOp") that must "[e]valuate the effects of the action," and determine whether they are "likely to jeopardize" any listed species. 50 C.F.R. § 402.14(g)(3), (4). This analysis must include all "indirect effects," which are those effects "caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* § 402.02. The agency must then determine "whether and in what manner to proceed," *id.* § 402.15(a), so as to ensure that its "action" does not "jeopardize" any listed species, or "result in" the destruction of "critical" habitat. 16 U.S.C. § 1536(a)(2). For example, if the FWS finds that the action will result in jeopardy, the action agency must determine whether to adopt any "reasonable and prudent alternatives" proposed by the Service to avoid that result. *Id.* § 1536(b)(3)(A). If, however, no such alternatives exist, the agency can proceed

with the action only by seeking an exemption from the Endangered Species Committee. *Id.* § 1536(e).[2]

B. Pertinent Provisions Of The CWA

The overarching objective of the Clean Water Act ("CWA") – which was enacted one year *before* the ESA – is to "restore and maintain the chemical, physical, and *biological integrity* of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). The statute establishes a "national goal" of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . . . " *Id.* § 1251(a)(2). In light of the CWA's purpose to restore the "biological integrity" of the nation's waters, *id.* § 1251(a), both EPA and FWS have declared that they "find the goals of the CWA and ESA compatible and complementary." 66 Fed. Reg. 11,202, 11,208 (2001); *see also* Court of Appeals Excerpts of Record ("Ct. App. ER") at 51 (the "goal of the CWA . . . is consistent with the ESA's purpose") (internal citation omitted).

The CWA authorizes EPA to issue permits for the discharge of pollutants into navigable waters. 33 U.S.C.

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[2] The ESA regulations also establish an "optional process" known as "[i]nformal consultation," during which the "Service may suggest modifications to the action" for the purpose of avoiding adverse impacts on listed species, and hence bypassing formal consultation. *See* 50 C.F.R. § 402.14(a), (b). The FWS routinely conducts thousands of such consultations with action agencies each year and, in the vast majority of cases, the Service concludes that minor or no changes are needed to address the needs of listed species. *See* FWS, *Budget Justifications and Performance Information, Fiscal Year 2007* 87 (of 76,000 consultations conducted in FY 2005, 73,000 were "informal," *i.e.*, the FWS and action agency agreed that the actions could be pursued without adversely affecting a listed species).

§ 1342(a). When EPA issues such a permit for an activity that "may affect" a listed species or critical habitat, EPA consults with the Service under Section 7(a)(2) of the ESA in an effort to avoid or mitigate such impacts. *See* 50 C.F.R. §§ 402.13, 402.14.

Section 402 of the CWA also allows states to apply to EPA for authorization to administer the permitting program, albeit with ongoing oversight by EPA. *See* 33 U.S.C. § 1342(b). The statute provides that EPA "shall approve" the transfer of permitting authority if EPA finds that a state has satisfied nine criteria – which range from the very broad to the very specific. *Id.* Contrary to petitioners' characterization, however, EPA can and does exercise considerable discretion in applying many of these criteria, several of which clearly implicate wildlife-related impacts.

For example, the first criterion EPA considers is whether the State has "adequate authority" to "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title." 33 U.S.C. § 1342(b)(1)(A). In turn, one of the listed sections provides for the establishment of "effluent limitations" for a "point source or group of point sources" whenever such "limitations" are needed, among other things, to "assure . . . the protection and propagation of a balanced population of shellfish, fish and wildlife. . . . " *Id.* § 1312(a). Similarly, 33 U.S.C. § 1311, another of the CWA sections listed in the transfer provision, requires that all permits must satisfy "any applicable water quality standard established pursuant to this chapter," *id.* § 1311(b)(1)(C), and the "water quality standard[s]" issued by EPA and/or States "shall be established taking into consideration their use and value for . . . *propagation of fish and wildlife*,"

among other "designated uses." *Id.* § 1313(c)(2)(A) (emphasis added).

Accordingly, EPA has the authority under the CWA to evaluate the sufficiency of the State's program to comply with "limitations" and "standards" designed for the "protection and propagation of fish, shellfish, and wildlife." *See* NAHB App. 84-85 ("The CWA directs States to take into consideration, among other things, the 'propagation of fish and wildlife' ") (internal citation omitted). If EPA "determines" that a State's program is not "adequate" in that regard, then it must deny the transfer of authority. 33 U.S.C. § 1342(b).

After EPA transfers NPDES authority, the CWA and implementing regulations provide for ongoing federal "oversight" of the State's permitting activities. NAHB App. 97. The State, for example, must advise EPA of each permit it "propose[s]" to issue, 33 U.S.C. § 1342(d)(1), and EPA may "object" to any such permit as being "outside the guidelines and requirements of this chapter." *Id.* § 1342(d)(2); *see also* 40 C.F.R. § 123.44(c). If EPA objects, the State either must address EPA's concerns in the permit, or otherwise permitting authority reverts to EPA. 33 U.S.C. § 1342(d)(4). Under the regulations, States must also provide draft permits to "Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources. . . . " 40 C.F.R. § 124.10(c)(iii). If, however, neither EPA nor any other federal agency takes any "action" with regard to a State-issued permit, then the vital safeguards of the Section 7(a)(2) consultation process will never come into play. 16 U.S.C. § 1536(a)(2).

C. The Federal Agencies' Past Compliance With The ESA And CWA, And The Consultation Conducted In This Case

EPA has already transferred NPDES authority to *45* states (including Arizona) and has routinely conducted Section 7(a)(2) consultations before deciding whether to transfer such authority. *See* EPA Appendix ("EPA App.") at 3a, 7a n.3. Indeed, prior to this case neither EPA nor FWS has suggested that, in taking actions under the CWA, EPA could avoid compliance with Section 7(a)(2). Rather, both agencies have taken the opposite position.

In 2001, after soliciting public comment, EPA and FWS jointly published in the Federal Register a "Memorandum of Agreement" ("MOA") that "address[ed] interagency coordination under" the CWA and ESA, 66 Fed. Reg. 11,202, NAHB App. 245, and was designed to "help ensure that EPA actions *meet the substantive requirements of section 7(a)(2) of the ESA. . . .* " *Id.* at 253 (emphasis added). Instead of providing that EPA's decisions on transferring NPDES authority could *avoid* Section 7(a)(2) entirely – as EPA now argues – the MOA declares that the "ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources." *Id.* at 274. For that reason,

> *EPA's current practice is to consult with the Services* where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species.

Id. at 260 (emphasis added).

Consistent with this public notice, when Arizona requested permitting authority, EPA, in soliciting comments

on the State's application, advised the public that EPA "will not make a final decision on AZPDES program approval until after . . . completion of the ongoing consultations with the [FWS] on effects program approval may have on endangered or threatened species and their designated critical habitat. . . . " 67 Fed. Reg. 49,916, 49,917 (2002), NAHB App. 546. EPA further stated that it is

> *required by [the ESA]* . . . to consult with other federal agencies before making a federal decision in this matter . . . *[T]he ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service* on the effects of federal actions on endangered species. *EPA has determined that its action on the AZPDES program application constitutes a federal action that is subject to section 7 of the ESA.* Section 7(a)(2) of the ESA places a statutory requirement (*separate and distinct from CWA section 402(b)*) for EPA to ' * * * insure that any action . . . * * * is not likely to jeopardize the continued existence of any endangered species or threatened species'. . . .

Id. at 548 (emphasis added); *id.* at 559 ("[A]pproval of the State permitting program under section 402 is a federal action subject to this requirement [ESA section 7(a)(2)]").

Accordingly, to comply with Section 7(a)(2), EPA "request[ed] the initiation of formal consultation" with FWS on the "effects of the USEPA's proposed approval of the AZPDES program on Federally-listed" species. NAHB App. 583. EPA also provided FWS with a "Biological Evaluation" ("BE") that acknowledged that "all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters in Arizona *may be affected by the action.*" *Id.* at 614 (emphasis added). EPA attached

to the BE a list of *60* endangered and threatened species that could be harmed by the transfer of authority. *Id.* at 621-23.

EPA further recognized that, "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes for consultation will no longer apply," since the State, rather than EPA, will generally be making permit decisions. NAHB App. 615. Thus, "there will be a reduction in the number of mechanisms available to the Service to protect Federally-listed species and designated critical habitat in Arizona." *Id.*

During the consultation, FWS biologists concluded that, in the absence of effective State or other safeguards to protect listed species following the transfer, the proposed action would have a "devastating effect" on listed species, Ct. App. ER 64, and, indeed, that it would jeopardize the continued existence of several such species. *Id.* at 69-72. This concern was based on the fact that Section 7(a)(2) consultations on NPDES permits in Arizona have in fact proven essential in avoiding and mitigating the effects of large construction projects on several species, but that these "[g]reat strides in minimizing the disturbance of construction projects . . . will be diminished, if not lost" upon transfer of authority to Arizona because the State lacks sufficient safeguards for imperilled species. Ct. App. ER 68; *id.* ("[T]his action is more than a shift in program authority; we will lose our Section 7 nexus for consultation and construction projects . . . will destroy important habitat and adversely affect listed species.").

Thus, in its discussions with EPA, FWS took the position that the BiOp on the proposed transfer of authority

"must evaluate the indirect effects associated with the proposed action," and that these effects *"will appreciably reduce the conservation status"* of several listed species due to the inadequate State or other safeguards for these species. Ct. App. ER 117 (emphasis added). However, even though EPA conceded that "the approval of the State permitting program . . . is a federal action subject to this [Section 7(a)(2) consultation] requirement," 67 Fed. Reg. 49,916, 49,919, Ct. App. ER 77, the agency nonetheless maintained "that its proposed approval of the Arizona NPDES program will not result in jeopardy" because the loss of valuable species protections did not qualify as an "indirect effect" of the transfer within the meaning of the ESA implementing regulations. Ct. App. ER 119-120.

After this inter-agency disagreement was "elevated" to Interior Department and EPA officials in Washington, D.C., Ct. App. ER 116-127, FWS produced a BiOp that acknowledged that "we have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits," NAHB App. 111-12, and that the loss of those benefits was "an indirect effect" that "will appreciably reduce the conservation status" of listed species. *Id.* The BiOp further stressed that, as a result of the transfer of authority, there "will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical habitat in Arizona." *Id.* at 117.

Yet, while acknowledging that listed species would lose vital ESA safeguards, the FWS failed to include in the BiOp any analysis of whether this loss will *in fact* result in the extinction of listed species, nor did the Service establish that the loss of Section 7(a)(2) protections would be offset by any other conservation measures. Instead, the

BiOp concluded that the "action, as proposed is not likely to jeopardize" the affected species because the "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program," but, rather, by "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." NAHB App. 114, 116. The FWS made no effort to explain how this rationale could be reconciled with *Hill*, in which identical reasoning – *i.e.*, that it was *Congress's* decision to fund the Tellico dam that was actually causing the extinction of the species at issue there – was squarely rejected as contrary to Section 7. *See* 437 U.S. at 172.

D. The Ruling Below

In ruling that EPA's reliance on the FWS's BiOp was arbitrary and capricious, the court of appeals first stressed that EPA had "definitively stated several times during the decisionmaking process, including when announcing the final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species." EPA App. 23a. Having made that determination, the court reasoned, EPA could not lawfully conclude that its transfer decision could not possibly result in any effects to listed species because EPA "has no authority to disapprove transfer applications" due to "an impact on listed species, section 7(a)(2) of the [ESA] notwithstanding." *Id.* at 25a.

Rather, the court found that this rationale reflected a "nonsensical" view of Congressional intent, under which EPA was required to consult "but had no authority to do anything concerning the matter about which it had to consult," *e.g.*, EPA would have to transfer NPDES

authority *even if doing so would admittedly result in the extinction of a species*. *Id.* at 25a, 26a. Thus, EPA's recognition that, pursuant to Section 7(a)(2), it *must* consult before making a transfer decision necessarily meant that the agency had the corollary duty to take into account the anticipated effects of the transfer on listed species, since "[s]ection 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." *Id.* at 26a (emphasis in original). Rather, "*both* apply" if any agency "'action' is under consideration." *Id.* (emphasis in original).

Relying heavily on *Hill*, the court also rejected the BiOp's finding that the "loss of section 7 consultation was not an effect of [EPA's] transfer decision. . . . " EPA App. 28a. On the contrary, the court reasoned that, since "section 7(a)(2) speaks in mandatory terms" – and requires agencies to "insure" that their decisions are unlikely to result in the extinction of species – it imposes an explicit "duty" on agencies not to "jeopardize protected species" whenever the agencies affirmatively authorize or otherwise carry out "any action." *Id.* at 31a. The court further reasoned that, in response to *Hill*, Congress had chosen to create the Endangered Species Committee for the purpose of considering granting exemptions to agencies "*after* consultation is completed." *Id.* at 37a (emphasis in original).

The court also found the BiOp to be inadequate because it "never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona." EPA App. 49a. The court did not rule out the possibility that a transfer decision could be based on an

adequate BiOp but instead simply remanded for a "more careful consideration" of whether "other federal and state statutory provisions" would in fact sufficiently substitute for the protections afforded by the Section 7(a)(2) process. *Id.* at 61a.[3]

REASONS FOR DENYING THE WRIT

I. THE POSITION ADVANCED IN EPA'S PETITION IS A *POST HOC* RATIONALIZATION THAT THE COURT SHOULD NOT CONSIDER.

As EPA's petition acknowledges, the legal position that EPA is now advancing – *i.e.*, that the "no jeopardy" and consultation requirements of Section 7(a)(2) have no legal relevance to the NPDES transfer decision, EPA Pet. at 22 – was *not* the position that the government took either in the administrative proceedings or before the court below. *Id.* at 23 ("At both the beginning and the end of its consideration of Arizona's transfer application, however, EPA expressed the view that consultation concerning that application was required by the ESA."). To the contrary, both EPA and FWS "definitively stated" during the administrative process – as well as in their 2001 published MOA – that EPA must comply with Section 7(a)(2). *See* EPA App. 23a.

[3] Judge Thompson dissented on the grounds that EPA's decision to transfer NPDES authority "was not 'agency action' within the meaning of section 7," EPA App. 65a – a rationale that the dissent conceded was not even advocated by EPA, *id.* at n.1, and that the government has relegated to a footnote here. *See* EPA Pet. at 13 n.4.

Plainly, therefore, the government's newly minted position that Section 7(a)(2) is "altogether inapplicable" to EPA's transfer decision, EPA Pet. at 25 n.10, is the quintessential *post hoc* rationalization that should not even be *considered* by this Court, let alone serve as a basis for review. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *see also American Textile Mfs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981) (*post hoc* rationalizations "cannot serve as a sufficient predicate for agency action"); *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (if an agency's finding "is not sustainable on the administrative record made, then the decision must be vacated and the matter remanded. . . . ").

That EPA is essentially urging the Court to flout basic administrative law principles to sustain a position that the agency did not even raise below is apparent from EPA's petition and the *non*-record materials that EPA has felt compelled to include in its Appendix. EPA concedes that its position, as embodied in the Administrative Record, was that it must comply with Section 7(a)(2), *see* EPA Pet. at 22, and that the court below was "correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand." *Id.* Despite these concessions, EPA nonetheless maintains that this Court's review is warranted because the "relevant federal agencies have *since*" – *i.e.*, since the agency decision under review was made – "*clarified their understanding* of the legal principles that govern in this setting." *Id.* (emphasis added).

But this "clarification" of the agencies' "understanding" – which is actually a complete *reversal* of their long-standing view that EPA must comply with Section 7(a)(2) in making NPDES transfer decisions – took place not only long after EPA decided to transfer authority to Arizona, but many months after the Ninth Circuit issued the ruling

under review. Indeed, the new position – which is reflected in an *October 2006* exchange of letters between EPA and FWS concerning Alaska's application for NPDES authority, *see* EPA App. 93a-116a – was devised at the same time that EPA was asking this Court for two extensions of time to file its petition for certiorari. *See* EPA's 9/26/06 Application for a Further Extension of Time. Accordingly, these letters are neither in the Administrative Record nor even in the Court of Appeals record. Instead, having lost below, EPA evidently set out to manufacture a new record with a different position that the agency now asks this Court to endorse. It could hardly be plainer that the position on which EPA's petition is predicated is the worst sort of *post hoc* justification that this Court has repeatedly ruled may not serve as the basis for *any* judicial review of agency action.

If EPA wishes to adopt an entirely new position on whether it must comply with Section 7(a)(2) when deciding whether to transfer NPDES authority, it may do so, provided that it follows proper procedures and adequately explains its reversal of position from the one that it previously announced to the public following notice and comment proceedings. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*"). Indeed, notwithstanding the ruling below, EPA is evidently in the process of changing its position on its Section 7(a)(2) obligations in connection with Alaska's application for authority. *See* EPA App. 93a-116a. But EPA's shift of position counsels strongly in favor of denying, not granting, the petitions in this case, in which EPA asks the Court to run roughshod over rudimentary principles of administrative law and, in effect, to

disregard the agency positions, as set forth in the record, on which the court below properly relied.[4]

II. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS THAT NECESSITATES REVIEW BY THIS COURT.

Petitioners' contention that there is an inter-circuit conflict that necessitates review is also mistaken. The two rulings on which petitioners rely – *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) ("*Platte River*") and *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) ("*American Forest*") – do not directly conflict with the ruling below, let alone support EPA's new position that Section 7(a)(2) has no bearing on NPDES transfer decisions.

In *Platte River* the D.C. Circuit addressed the "need for wildlife protective conditions in the annual licenses issued to two hydroelectric projects on the Platte River." 962 F.2d at 30. Contrary to EPA's new position here, the Federal Energy Regulatory Commission ("FERC") "*did*

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[4] In implicitly acknowledging that it is asking the Court to endorse a *post hoc* rationalization, EPA asserts that, "despite the government's reluctance to urge the court of appeals to rest its decision on the view that Section 7(a)(2) is altogether inapplicable to the mandatory transfer decision," there is "no obstacle to this Court's review" because "[b]oth the State of Arizona and private intervenors squarely raised the issue. . . . " EPA Pet. at 25 n.10. It is, however, a bedrock axiom of administrative law that an "agency's action must be upheld, if at all, *on the basis articulated by the agency itself.*" *State Farm*, 463 U.S. at 50 (emphasis added); *Chenery*, 332 U.S. at 196 (courts "must judge the propriety of [agency] action *solely by the grounds invoked by the agency*") (emphasis added).

consult informally with FWS – and largely *did* adopt FWS' recommendations." *Id.* at 33 n.2 (emphasis added). In particular, FERC imposed on one of the two licensees several "emergency measures" deemed "necessary to prevent irreversible environmental damage" to listed bird species. *Id.* at 31. In view of those measures and the fact that Section 7(a)(2) consultation *had* been conducted, the court in that case was simply not called on to decide whether Section 7(a)(2) could be avoided entirely; in particular, the court did not address *any* contention that FERC was authorizing actions that would, in violation of Section 7(a)(2), jeopardize the continued existence of any listed species or destroy any critical habitat.[5]

Instead, conservation groups argued that FERC should have gone even further than the wildlife protection measures adopted through the consultation process by imposing *additional* conditions on the second project, which FERC had licensed in 1941 and for which FERC had determined it could not, under the license and FERC's statutory authority, "impose conditions unilaterally." 962 F.2d at 30. In rejecting that specific argument, however, the D.C. Circuit focused its analysis *not* on Section 7(a)(2) but, rather, on a *different* part of the ESA: Section 7(a)(1), 16 U.S.C. § 1536(a)(1). That provision imposes a separate obligation on federal agencies to take affirmative steps to "*utilize their authorities* in furtherance of the purposes of

[5] Indeed, in a predecessor case, the D.C. Circuit had remanded on the grounds that it was "not reasonable for FERC, in light of the many years of governmental and private concern over the projects' effects on wildlife habitats, to refuse to even explore or consider the need for some *interim* environmental protections pending the completion of the relicensing proceeding." *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 119 (D.C. Cir. 1989).

[the ESA]" by carrying out "*programs* for the conservation" of species. *Id.* (emphasis added).

Quoting the Section 7(a)(1) language, the D.C. Circuit held that the "statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives," but "does not *expand* the powers conferred on an agency by its enabling act." *Platte River*, 962 F.2d at 34 (emphasis in original) (quoting 16 U.S.C. § 1536(a)(1)). Therefore, the court's analysis, which turns on the qualified language of Section 7(a)(1), is not in conflict with the ruling below which instead relies on the plain language of Section 7(a)(2) in finding that EPA failed to comply with that provision's "no jeopardy" mandate.[6]

The Fifth Circuit's ruling in *American Forest*, which addressed EPA's ESA obligations in the context of a transfer of NPDES authority to Louisiana, also did not resolve the specific issue raised by petitioners here, *i.e.*, whether EPA may disregard Section 7(a)(2) in making a transfer decision. Rather, the narrow issue in that case was whether EPA and FWS could legally condition the transfer of the NPDES program on Louisiana's agreement to enter into binding consultations with the FWS on all *State*-issued permits *after* the transfer. 137 F.3d at 293-94. The Fifth Circuit characterized EPA's legal position that it had such authority as being "virtually the same" as the argument "pressed" in *Platte River*. *Id.* at 298.

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[6] While *Platte River* does cite Section 7(a)(2) in the course of describing the general "obligations of federal agencies such as FERC to cooperate with the Secretary of the Interior in carrying out the directives of the ESA," 962 F.2d at 33, the D.C. Circuit's analysis of the conservation groups' argument specifically cites the Section 7(a)(1) language, which is not at issue in this case. *Id.*

Accordingly, in rejecting EPA's position that it could impose a consultation condition on Louisiana that the court believed was not authorized by the CWA or ESA – *i.e.*, consultation on *State* activities – the Fifth Circuit relied on the reasoning in *Platte River* which, once again, invoked the limiting language in Section 7(a)(1). *See* 137 F.3d at 299 ("We agree that the ESA serves not as a font of new authority but as . . . a directive to agencies to channel their *existing* authority in a particular direction.") (emphasis in original). *American Forest* certainly did *not* hold that EPA could bypass Section 7(a)(2)'s consultation requirement or that provision's prohibition on *any* agency actions that jeopardize the continued existence of listed species.

Indeed, in that case, as here, EPA took the position that it "was required to consult with FWS . . . regarding approval of the [Louisiana] application to satisfy EPA's obligations under ESA section 7(a)(2)." Brief for the Respondents, at 29, *American Forest & Paper Ass'n v. EPA*, No. 96-60874 (5th Cir. July 1, 1997) (reproduced in Addendum to Defenders' Court of Appeals' Reply Brief). Consequently, the Fifth Circuit stated that "[w]hether EPA's approval of Louisiana's permitting program constitutes 'agency' action for ESA purposes is largely beside the point," 137 F.3d at 298 n.6, and, in fact, the court evidently assumed that Section 7(a)(2) *did* "require[] EPA to consult with FWS" before making the transfer decision. *Id.* at 298.[7]

[7] While holding that EPA could not impose a consultation condition on a State, the Fifth Circuit did not suggest what should happen if, following consultation, the FWS were to conclude that transfer of authority would result in the extinction of a species. As explained earlier, if FWS and EPA were unable to devise a "reasonable and

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In short, there is no direct conflict between the ruling challenged by petitioners here – that, in consulting under Section 7(a)(2), FWS and EPA must assess whether the transfer of NPDES authority will, in fact, result in the extinction of any species or the destruction of critical habitat – and the decisions cited by petitioners, which actually resolve different issues and focus on a separate section of the ESA. *See* Supreme Court Rule 10 ("Considerations Governing Review on Certiorari": "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the *same* important matter") (emphasis added).[8]

III. THERE ARE NO PRACTICAL RAMIFICATIONS OF THE RULING BELOW THAT COUNSEL IN FAVOR OF REVIEW.

EPA asserts that there are "substantial practical implications of the court of appeals' decision," EPA Pet. at 21, but it avoids saying what they are or why they counsel in favor of review. In reality, since virtually all federal agencies have, at least since *Hill*, made compliance with Section 7(a)(2) a routine feature of their operations, the ruling below has minimal "implications."[9]

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prudent alternative" to a "jeopardizing" action, EPA's recourse would be to seek an exemption from the Endangered Species Committee established in response to *Hill*. *See supra* at 4.

[8] While the ruling below refers to an "intercircuit conflict," EPA App. 44a, its discussion of the cases actually demonstrates that, as explained above, *Platte River* was based on "section 7(a)(1) language," *id.* 46a, and that the Fifth Circuit "relied on *Platte River*" to resolve a different issue than the one resolved below. *Id.*

[9] As noted earlier, action agencies and FWS engage in thousands of Section 7(a)(2) consultations every year, and in the overwhelming

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Indeed, even with respect to the NPDES program, the ruling will have, at most, a minor impact, since the vast majority of the States have *already* been granted NPDES authority, EPA App. 3a, and many such transfers of authority have occurred *after* Section 7(a)(2) consultation, in accordance with the longstanding position of EPA and FWS on this issue. *Id.* at 7a n.3 ("EPA has followed the section 7 consultation process before transferring permitting authority to states for more than a decade."). Even as to Arizona, the ruling below does not foreclose transfer but, rather, simply requires the federal agencies to first engage in a "more careful consideration of the actual protection" that federally listed species will receive in the absence of Section 7 safeguards. *Id.* at 61a.

Also groundless is EPA's contention that the ruling below " 'would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency.' " EPA Pet. at 21 (internal citation omitted; emphasis in original). In fact, there is nothing in the ruling that suggests that Congress cannot exempt any agency action – including decisions to transfer NPDES authority – from Section 7(a)(2)'s requirements. Indeed, where it has wanted to do so for a particular activity, Congress has taken precisely that approach and courts have honored that intent. *See, e.g., Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (applying rider exempting telescope project from Section 7(a)(2)). That Congress has not seen fit to do so with respect to NPDES

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majority of cases the needs of listed species are easily factored into the agencies' decisionmaking processes. *See supra* at n.2.

transfer decisions further counsels against review by this Court.[10]

IV. THE RULING BELOW IS CORRECT.

The ruling below is not only a correct reading of the plain language of Section 7(a)(2), but it is clearly consistent with this Court's decision in *Hill* and Congress's response to that ruling. If, as this Court held in *Hill*, the plain terms of the jeopardy prohibition of Section 7(a)(2) applied to a massive dam project that had already cost "more than $ 100 million dollars" in public funds, was "near completion" when the ESA was enacted, 437 U.S. at 172, 174, 184, and for which "Congress had continued appropriations . . . with full awareness of the [endangered species] problem," *id.* at 167, then it cannot plausibly be the case that the same provision has no relevance to EPA's "final action authorizing" transfer of CWA permitting authority to Arizona, 67 Fed. Reg. 79,631 – an action which, EPA conceded, could affect 60 listed species. *See supra* at 11. Rather, if petitioners do not like the consequences of this Court's ruling that, in enacting the Section 7(a)(2) consultation process, Congress intended to "give endangered species priority over the 'primary missions' of

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[10] Petitioners argue that the ruling below construed Section 7(a)(2) broadly, but the ruling also contains important limitations. Consistent with the language of Section 7(a)(2), the court below reasoned that the no-jeopardy mandate comes into play when the "agency engages in an *affirmative* action that is . . . within its decisionmaking authority." EPA App. 38a (emphasis added). That limitation has already been relied on by the Ninth Circuit to *reject* a Section 7(a)(2) claim where an agency did not take any "'action' triggering a consultation duty." *Western Watersheds Project v. Matejko*, Nos. 05-35178, 05-35208, 2006 WL 3079147 *8 (9th Cir. July 24, 2006, revised Nov. 1, 2006).

federal agencies," *id.* at 185 (internal citation omitted), then their proper recourse is to Congress, not to this Court.

Even aside from *Hill*, it is impossible to reconcile EPA's and NAHB's position with well-entrenched principles of statutory construction. One such principle – to which EPA only pays lip service – is that "'[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" EPA Pet. at 10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (courts should strive to adopt interpretations that "give effect to each" law "while preserving their sense and purpose.").

Here, the most straightforward way of "giv[ing] effect" to each law is to conclude, as did the court below, that EPA must apply the CWA criteria established in 1972, but that it must *also* "insure" – pursuant to the separate Section 7(a)(2) requirement imposed on it (and all agencies) in 1973 – that the transfer is "not likely to jeopardize the continued existence of any" listed species. 16 U.S.C. § 1536(a)(2). In sharp contrast, EPA's approach does not "give effect" to Section 7(a)(2) at all; instead, it would require the Court to hold, in effect, that "*any* action" somehow does not encompass the agency action at issue here, and hence that EPA may blithely ignore Section 7(a)(2)'s consultation process and "no jeopardy" mandate. *Id.* (emphasis added).[11]

[11] While the ESA and CWA can be harmonized with little difficulty, even if they were found to be in unavoidable conflict, the correct result would not be for the Court to disregard Section 7(a)(2). Rather, it has

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That petitioners' approach requires the Court to contort the plain terms of Section 7(a)(2) is also apparent from their comparison of that provision with Section 7(a)(1). Petitioners concede that Section 7(a)(1) only directs agencies to "*utilize their authorities* in furtherance of the purposes" of the ESA, 16 U.S.C. § 1536(a)(1) (emphasis added), whereas Section 7(a)(2) contains no such limiting language in prohibiting agencies from jeopardizing listed species. *See* EPA Pet. at 14-16. However, petitioners argue that the Court should, in effect, rewrite Section 7(a)(2) by inserting the qualification that Congress left out. *Id.* But that approach would contravene the "general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal citation omitted).[12]

Petitioners argue that such judicial rewriting of the statutory language is appropriate because, when Congress adopted Section 7(a)(2) in its present form, Congress did not reiterate, in the legislative history, that it really meant

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long been "well-settled" that "[w]here provisions in [] two acts are in irreconcilable conflict, *the latter act to the extent of the conflict constitutes an implied repeal of the earlier one* . . . ." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (emphasis added); *see also Hill*, 437 U.S. at 192.

[12] Since, under petitioners' approach, Section 7(a)(2) would add nothing of substance to Section 7(a)(1), their argument also contravenes the " 'cardinal principle of statutory construction . . . [that] [i]t is our duty to give effect, if possible, to every clause and word of a statute. . . . ' " *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal citation omitted).

it when it said that "[e]ach federal agency shall . . . insure that any action . . . is not likely to jeopardize" any listed species. *See* EPA Pet. at 17. It is, however, a novel notion of statutory construction that Congress's *silence* in legislative history can be invoked to justify disregarding the plain terms of a statute. *Cf. Barnhart*, 534 U.S. at 450 (statutory construction "inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent'") (internal citation omitted). In any event, as the ruling below explains, the legislative history simply reinforces that Congress intentionally omitted "'any type of qualifying language from'" Section 7(a)(2), EPA App. 38a (quoting H.R. Rep. No. 95-1625 at 10 (1978)), and instead adopted the Endangered Species Committee process as the sole vehicle for resolving otherwise intractable conflicts between the needs of listed species and the "'primary missions of federal agencies.'" *Id.*[13]

Equally misplaced is petitioners' reliance on a FWS regulation that provides that "'Section 7 . . . appl[ies] to all actions in which there is *discretionary* Federal involvement or control.'" EPA Pet. at 18 (emphasis in original) (quoting 50 C.F.R. § 402.03). The simple answer is that

[13] EPA acknowledges that the "1978 amendments softened the practical effect of the decision in *Hill* by creating the Endangered Species Committee," EPA Pet. at 16, but EPA never explains why this is not the congressionally mandated mechanism for resolving any irreconcilable conflict that might arise between the CWA and Section 7(a)(2). Once again, Congress has clearly mandated that "any" action that will result in jeopardy to a listed species or destruction of critical habitat can go forward *only* if either (a) the action agency agrees to implement a "reasonable and prudent alternative" recommended by FWS, or (b) the agency obtains an "exemption" from the Endangered Species Committee. 16 U.S.C. § 1536(b), (e), (h).

EPA intentionally made "no argument" – either in the Administrative Record or in the court below – "that its transfer decision was not a 'discretionary' one within the meaning of 50 C.F.R. § 402.03." EPA App. 40a. Indeed, EPA expressly *disclaimed* any reliance on the regulation, and instead stressed to the court of appeals that "'EPA did consult,'" and hence the "'*only issue* before [that court] is the *adequacy* of that consultation.'" *Id.* at 43a n.19 (emphasis added) (quoting EPA CR 28(j) letter of July 27, 2005). Accordingly, once again, it would contravene fundamental administrative law precepts for this Court to sustain the transfer decision on the basis of the regulation.[14]

Finally, contrary to petitioners' contention, the ruling below in no way conflicts with *Dep't of Transportation v. Public Citizen*, 541 U.S. 752 (2004). *See* EPA Pet. at 12. The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the statute at issue in *Public Citizen*, "imposes *only* procedural requirements on federal agencies with a particular focus on requiring agencies to undertake

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[14] If the Court were to consider the regulation, the ruling below explains how it can be read, as it must be, to be compatible with the plain language of Section 7(a)(2). *See* EPA App. 39a-42a. In addition, EPA clearly has at least some "discretionary ... involvement or control," both before and after NPDES transfer decisions are made. 50 C.F.R. § 402.03. As discussed previously, several of the CWA criteria require EPA, in deciding whether to transfer, to make discretionary determinations, including with regard to the adequacy of State programs to address wildlife impacts. *See supra* at 7. Moreover, as occurred in this case, EPA solicits public comment before deciding whether to transfer a State program; a federal agency does not solicit and consider public comment if those comments cannot inform some exercise of agency discretion. And, after a transfer is made, EPA exercises considerable oversight over the State's permitting actions. *See supra* at 8.

analyses of the environmental impact of their proposals and actions." 541 U.S. at 756-57 (emphasis added). Accordingly, if, as the Court ruled in *Public Citizen*, an agency "has no authority" to take environmental impacts into account in making a particular decision, then it "serve[s] 'no purpose' in light of NEPA's regulatory scheme as a whole" to require an agency to prepare an Environmental Impact Statement analyzing those impacts. *Id.* at 767 (internal citation omitted); *see also* EPA App. 89a-91a.

In contrast, by its plain terms and as construed in *Hill*, Section 7(a)(2) of the ESA is *not* a purely procedural requirement. Rather, it unmistakably imposes a substantive mandate on "[e]ach Federal agency" that takes "any action": the agency must "insure" that the action "is not likely to jeopardize the continued existence" of any listed species or "result in" the destruction of critical habitat. 16 U.S.C. § 1536(a)(2). Simply put, since the ESA prohibits EPA from making an NPDES transfer decision that would result in the extinction of listed species or the destruction of critical habitat – unless EPA obtains an exemption from the Endangered Species Committee – EPA is under the exact same obligation as the agency in *Hill* to both evaluate how species will in fact be affected by its decision, and to act (or refrain from acting) on the basis of that information.

CONCLUSION

The petitions should be denied.

Respectfully submitted.

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